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In the Supreme Court of the United States

OCTOBER TERM, 1977

THE AETNA CASUALTY AND SURETY COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

Page

Opinions below 1

Jurisdiction 1

Question presented 2

Statement 2

Argument 6

Conclusion 10

CITATIONS

Cases:

American Roller Co. v. *Budinger*, 513 F. 2d 982 8

County of Maricopa v. *Maberry*, 555 F. 2d 207 7

Gopman, In re, 531 F. 2d 262 7

Hull v. *Celanese Corp.*, 513 F. 2d 568 7

Kroungold v. *Triester*, 521 F. 2d 763 8

National Land & Investment Co. v. *Specter*, 428 F. 2d 91 8

Northeast Construction Co. v. *Romney*, 485 F. 2d 752 8

Premium Service Corp. v. *Sperry & Hutchinson Co.*, 511 F. 2d 225 7-8

Richardson v. *Hamilton International Corp.*, 469 F. 2d 1382, certiorari denied, 411 U.S. 986 7

United States v. *Clarkson*, 567 F. 2d 270 7

Woods v. *Covington County Bank*, 537 F. 2d 804 8

Page

Statutes and regulations:

28 U.S.C. 517 2

28 U.S.C. 2676 10

28 C.F.R. 50.15 ..... 2, 6

28 C.F.R. 50.16 6

Miscellaneous:

Code of Professional Responsibility:

Disciplinary Rule 5-105 10

Disciplinary Rule 5-105(A) 2

Disciplinary Rule 5-105(B) 2, 4

Ethical Consideration 5-15 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A18-A26) is reported at 570 F. 2d 1197. The opinion of the district court (Pet. App. A10-A17) is reported at 438 F. Supp. 886.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1978. A timely petition for rehearing was denied on March 9, 1978 (Pet. App. A27-A28). The petition for a writ of certiorari was filed on May 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Department of Justice and its attorneys may represent the United States and four federal air traffic controllers in a Federal Tort Claims Act suit, with the informed consent of the individual defendants.

STATEMENT

1. This litigation stems from the crash of a commercial airliner at Charlotte, North Carolina, on September 11, 1974. Petitioners, various liability and hull insurance companies, have paid approximately $25 million in settlement of wrongful death, personal injury, and property damage claims arising out of the crash. They brought this action for indemnification and contribution against the United States and four air traffic controllers employed by the Federal Aviation Administration, alleging that the defendants' negligence caused the crash (Pet. App. A19-A20).

In accordance with 28 U.S.C. 517 and 28 C.F.R. 50.15, the Department of Justice undertook to represent the four controllers. After government counsel filed a motion for summary judgment or dismissal of the complaint, petitioners filed a motion to disqualify government counsel from representing the four controllers. Petitioners contended that joint representation of all the defendants by government counsel would violate Disciplinary Rules (DR)5-105(A) and 5-105(B) of the *Code of Professional Responsibility* adopted by the North Carolina State Bar "in that the individual defendants are potentially adverse parties and the same attorney cannot represent their interests without an ethical conflict" (App. 21).[1]

[1]"App." refers to the joint appendix filed in the court of appeals.

Government counsel advised the court that he had obtained the written consent of the four controllers to be jointly represented together with the United States, that he had reviewed every aspect of the joint representation with the controllers and with his superiors at the Department of Justice, and that in the government's considered view there was no conflict of interest among the defendants (App. 72-73). A senior Justice Department representative similarly informed the court that, after extensive review, the Department had determined that joint representation was appropriate because "there is no conflict at the present time" and "the possibility of a conflict developing in the future is extremely remote" (App. 87). He added that "the individual defendants have been fully advised of the nature of the potential conflicts and have knowingly and intelligently asserted their desire to be represented jointly by the Department of Justice" (App. 87-88).

At a hearing before the district court, the Department's representative explained to the court that the government had thoroughly reviewed the conflict charge with the controllers in the presence of an independent attorney from the controllers' union, and that the controllers, with the concurrence of the union attorney, had consented to and indeed demanded joint representation by the Department of Justice (App. 92-95, 102, 104, 107-109).[2] The representative also informed the court that "[n]o individual defendant in this case is in possession of any evidence which is in any way damaging to the position of the other defendants or the United States" (App. 97).

[2]Petitioners suggest that the court of appeals may have been "misled" about the role of the independent attorney from the air traffic controllers' union in these discussions (Pet. 23-24 n. 14). We

2. On October 14, 1977, the district court disqualified government counsel from representing the controllers, concluding that joint representation in this case would violate Ethical Consideration 5-15 and Disciplinary Rule 5-105(B) of the *Code of Professional Responsibility* (Pet. App. A13).

The court of appeals reversed. It first rejected petitioners' argument that the United States is not an aggrieved party and therefore lacks standing to prosecute the appeal. The court observed that the United States Attorney and the Department of Justice "are the targets of the district court's order and, in our opinion, it would be sophistic to say that the Government is not adversely affected by their disqualification" (Pet. App. A22).

The court then stated that, because the case presented the purely legal question whether the Department of Justice is disqualified from representing the controllers under North Carolina law, the proper standard of review is whether the district court applied correct legal principles to the undisputed facts of the case (Pet. App. A23).

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stand by the statement in our brief in the court of appeals (Br. 10) that the government "thoroughly reviewed the conflict charge with the controllers in the presence of independent counsel for the air traffic controllers' union, and *** the controllers, with the concurrence of the independent union counsel, consented to—and *demanded*—joint representation by the Government." Two of the defendant controllers, Hunter and Hare, are union members. Union counsel participated in the discussions at the Department of Justice in order to inform the Department about the union's views strongly supporting joint representation of individual controllers in cases of this nature, to assist the Department in determining the possibility of conflict in this case, and to provide advice and guidance to the two union members (and the tw non-union members, if they wished). We find nothing in the court of appeals' opinion to indicate that the court was "misled" about the role of union counsel.

On the merits, the court of appeals held that the record does not support the district court's conclusion that the case presents an actual conflict of interest. The district court's conclusion, the court of appeals held, was "based solely upon conjecture" and "ignored the representation of Government counsel, which was accepted by the court, that in the conference between the representatives of the Department of Justice and the controllers, there was no dispute among them either with respect to their duties and responsibilities or the details of the plane crash" (Pet. App. A23-A24).

The court of appeals also noted that the district court had not taken proper account of the practical considerations bearing on the question of conflict, including the near certainty that the four controllers would incur no personal liability as a result of the litigation. Since the parties had agreed that at all relevant times the controllers were acting within the scope of their official employment, "any finding of negligence against them would be imputed to the Government and place liability upon it under the Tort Claims Act" (Pet. App. A24-A25). Furthermore, "if the Government and the controllers should be held to be jointly liable, the individual defendants would not be required to pay the damages, since a judgment against the United States would automatically bar the entry of any contemporaneous or subsequent judgment against them" (*id.* at A25).

Finally, the court of appeals held that the district court was incorrect in assuming that a client's consent to multiple representation could be effective only on the advice of an independent attorney (Pet. App. A25). Because, in the court's view, it was "obvious" that the government could provide adequate multiple representation, the court held the disqualification improper. Indeed, as

the court pointed out, representation of the controllers by the Department of Justice "is highly desirable since these defendants will have the benefit not only of Government counsel but also the reservoir of the Government's expertise in this highly involved and technical litigation, and will be spared the burden upon their time and resources incident to the employment of independent counsel" (*id.* at A26).

ARGUMENT

1. Petitioners argue (Pet. 11-16) that the United States could not properly appeal from the disqualification order. They claim that the court of appeals' ruling that the United States had standing to appeal conflicts with other decisions holding that attorneys cannot appeal, without their clients' consent, from judgments adversely affecting their clients' interests.

The decisions cited by petitioners are inapposite. The United States—the appellant in the court of appeals—is not an attorney. It is a party to this litigation. Unlike a private attorney, who generally has no independent interest in a case and who therefore has no basis for taking an appeal without the client's consent, the United States has a distinct interest in the question whether the Department of Justice may represent federal employees who are sued for acts performed within the scope of their official employment. Federal employees could well be inhibited in the performance of their official duties if they knew they would have to retain private counsel to represent them in complex damage suits arising from their official actions. The United States also has a pecuniary interest in the disqualification order because it will pay for the individual defendants' private counsel if the Department of Justice is not permitted to conduct the representation. 28 C.F.R. 50.15-50.16.

In any event, petitioners' objection is really one of form rather than substance. The four defendant controllers have consistently demanded that the Department of Justice represent them in this lawsuit (App. 104, 107-109). Because an appeal undoubtedly would have been proper if the controllers had been designated as appellants, petitioners' contention that their failure to join as party-appellants should defeat the appeal is plainly not of sufficient significance to warrant the attention of this Court.

2. Petitioners further contend (Pet. 16-20) that the court of appeals applied the wrong legal standard in reviewing the district court's decision. Petitioners argue that the court of appeals should have employed an "abuse of discretion" standard rather than reviewing the disqualification order for legal error.

In reviewing district court disqualification rulings, appellate courts regularly apply the "abuse of discretion" standard. See, *e.g.*, *United States* v. *Clarkson*, 567 F. 2d 270, 272 n. 2 (C.A. 4); *In re Gopman*, 531 F. 2d 262, 266 (C.A. 5); *Hull* v. *Celanese Corp.*, 513 F. 2d 568, 571 (C.A. 2); *Richardson* v. *Hamilton International Corp.*, 469 F. 2d 1382 (C.A. 3), certiorari denied, 411 U.S. 986. This standard requires that the court of appeals give broad leeway to the district court in finding facts, in drawing inferences from the facts, and in making ethical judgments about particular conduct. However, the "abuse of discretion" standard does not require an appellate court to give special deference to a district court with respect to a pure question of law. An appellate court should correct errors of law regardless of the standard of review. A district court has no "discretion" to make an error of law. See, *e.g.*, *County of Maricopa* v. *Maberry*, 555 F. 2d 207, 223 (C.A. 9); *Premium Service Corp.* v. *Sperry &*

Hutchinson Co., 511 F. 2d 225, 229 (C.A. 9); *Northeast Construction Co.* v. *Romney*, 485 F. 2d 752, 756 (C.A. D.C.); *National Land & Investment Co.* v. *Specter*, 428 F. 2d 91, 95 (C.A. 3). The Third and the Fifth Circuits agree with the court below that in a disqualification case presenting solely a question of law, an appellate court is free to review the district court's ruling for legal error. See *Kroungold* v. *Triester*, 521 F. 2d 763, 765 n. 2 (C.A. 3); *American Roller Co.* v. *Budinger*, 513 F. 2d 982, 985 n. 3 (C.A. 3); *Woods* v. *Covington County Bank*, 537 F. 2d 804, 810 (C.A. 5). There is accordingly no conflict among the circuits on this issue and no reason for review by this Court.

3. Petitioners next argue (Pet. 21-26) that the court of appeals erred by not remanding the case to the district court for an evidentiary hearing on the question whether the controllers had given their informed consent to joint representation by government attorneys. But the district court accepted the government's representation that the controllers were advised "at great length" of the conflict charges made by petitioners and nevertheless consented to joint representation (App. 95). Petitioners did not challenge the accuracy of that representation (*ibid.*). The single issue presented to the court of appeals was whether, on these undisputed facts, joint representation by government counsel would violate the *Code of Professional Responsibility*. No evidentiary hearing was or is needed to resolve that issue, because there are no material facts in dispute.

4. Finally, petitioners contend (Pet. 27-34) that the court of appeals improperly ignored the "potential" for a conflict of interest in this case.

The district court created a rule effectively prohibiting the Department of Justice from representing more than one party in Tort Claims Act cases. As the court of appeals properly ruled, there is no basis for such a rule generally, and there is no basis for application of such a rule to the undisputed facts of this case. Indeed, there would seem to be at least as great a theoretical possibility of conflict among petitioners—19 hull and liability insurers who might have widely disparate views on such matters as settlement but who nevertheless were and continue to be jointly represented by the same counsel—as among the defendants.

Petitioners suggest that the court of appeals improperly rested its conclusion that there is no potential for conflict in this case on the assumption that the four controllers would not be liable for any judgment that might be entered against them. This argument is wide of the mark for two reasons. First, the court of appeals did not rest its conclusion that disqualification was improper on this ground alone; the court observed that there is no dispute among the controllers about their duties and responsibilities or about the details of the crash, and the court noted that representation of the controllers by the Department of Justice would be "highly desirable" because of the Department's expertise in this highly technical and involved litigation (Pet. App. A24, A26). Second, the fact that there is no realistic prospect that the controllers will incur any personal liability as a result of the litigation is, as the court held, one of the "practical considerations" that appropriately bears on the question whether joint representation should be allowed in this case (Pet. App. A25). Because the individual defendants

are little more than nominal parties to this lawsuit,[3] their interest in pursuing potentially different litigation strategies is greatly reduced, and any prospect of injury to them from the lack of separate counsel is similarly minimized.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3]Because the controllers were acting within the scope of their employment, a finding that they were negligent (and that the negligence was responsible for the accident) would lead to liability by the United States. If the United States should be held liable, that liability would be exclusive. 28 U.S.C. 2676. Although some circumstances—such as a disagreement between the jury's verdict in the individual defendants' cases and the judge's findings in the United States' case—could lead to the entry of a judgment against the individual defendants, the prospect of that outcome is remote.

[4]In response to petitioners' expressions of concern for the controllers' right to independent representation, the court of appeals observed that, in filing the motion for disqualification, "counsel for the plaintiffs seems to have been motivated more by a desire to fragmentize the defense than by any sensitivity to the ethical considerations involved" (Pet. App. A24 n. 7). While Disciplinary Rule 5-105 was designed to protect the interests of clients in obtaining proper representation, it was not designed as a tactical device by which plaintiffs could seek to disrupt the presentation of a common defense (*ibid.*).